

**TOWN OF SALEM
INLAND WETLANDS & CONSERVATION COMMISSION
REGULAR MEETING MINUTES
MONDAY, DECEMBER 6, 2021 – 7:00 P.M.
SALEM TOWN HALL – CONFERENCE ROOM 1**

1. Call to Order

Chairperson Bradley called the meeting to order at 7:05 p.m.

2. Roll Call/Seating of Alternates

Present were Chairperson Kimberley Bradley, Vice-Chairperson Diba Khan-Bureau, Commissioners Jennifer Messervy, Jim Mulholland, and Edward Natoli, Jr. Absent were Secretary Roger Phillips, Alternate Commissioners Jim Miller, Larry Moore, and Michael Smith. Also present was Zoning & Wetlands Enforcement Officer (ZWEO) Matthew Allen.

3. Approval of Agenda

M/S: Khan-Bureau/Messervy, to approve the Inland Wetlands & Conservation Commission Agenda for December 6, 2021, as presented. Discussion: The following addition to the Agenda was proposed:

6(b) Election of Officers

M/S/C: Messervy/Khan-Bureau, to approve the Inland Wetlands & Conservation Commission Agenda for December 6, 2021, as amended. Discussion: None. Voice vote, 5-0, all in favor.

4. Approval of Minutes:

a. November 1, 2021 Regular Meeting Minutes

M/S/C: Natoli/Khan-Bureau, to approve the Regular Meeting Minutes of November 1, 2021. Discussion: None. Voice vote, 5-0.

5. Public Comment

Recreation Commission Chairman Alan Maziarz spoke on behalf of the Recreation Commission to receive their guidance on the necessary review and approval process for the bridge along the Harris Brook Trail, which was installed unbeknownst to the Commission.

Chairperson Bradley proposed adding the item to the Commission's January Agenda; Recreation Commission Chairman Maziarz agreed and will plan to attend the meeting.

6. New Business

a. 2022 Meeting Schedule – tabled

The Inland Wetlands & Conservation Commission Meetings will continue to be held on the first Monday of every month at 7:00 p.m. in Conference Room 1, Salem Town Hall.

Should the meeting fall on a holiday (Independence Day, Labor Day, 2023 New Year's Day), the meeting will be held on the following Tuesday. An alternate location will be sought for those evenings when the Conference Room will be in use. ZWEO Allen will revise the Commission's Regular Meeting Schedule for their approval in January 2023.

b. Election of Officers

Commissioner Natoli nominated the following Commissioners: Kim Bradley, Chairperson; Diba Khan-Bureau, Vice-Chairperson, and; Roger Phillips, Secretary. There being no additional nominations, the nominations were closed.

As far as he is aware, ZWEO Allen stated that Commissioner Phillips continues to be interested in maintaining his role as the Secretary and, per the First Selectman, he will be able to participate in future in-person meetings, unmasked, so long as he maintains the proper health and safety protocols.

M/S/C: Natoli/Mulholland, to maintain the following current slate:

Kim Bradley, Chairperson

Diba Khan-Bureau, Vice-Chairperson

Roger Phillips, Secretary

Discussion: None. Voice vote, 5-0, all in favor.

c. Wetlands Training

Chairperson Bradley introduced, welcomed, and thanked Darcy Winther, Connecticut Department of Energy and Environmental Protection (CT DEEP), Land & Water Resources Division, Bureau of Water Protection and Land Reuse, and Land Use Attorney Michael Zizka for presenting this evening's training session. She also expressed her appreciation to the Eightmile River Wild & Scenic Coordinating Committee (ERWCC) and the National Park Service who made this training session possible through a generous grant. The purpose of the training is to provide an overview and discuss the requirements of the Agency.

Atty. Zizka, Halloran & Sage, LLP, provided a brief background of his experience. He began his career as a hydrogeologist with the CT DEP (now known as CT DEEP, Connecticut Department of Energy & Environmental Protection) and has been practicing as an attorney specializing in Land Use and Municipal Law since 1982. He recently updated his well-known book entitled *What's Legally Required? A Guide to the Legal Rules for Making Local Land Use Decisions in the State of Connecticut* (2004), which is currently awaiting publication.

Darcy Winther, who currently works with the Land & Water Resources Division of CT DEEP, has a background in zoology and environmental conservation. She also has legislative experience and earned a New England Soil Scientist certificate. She has been

involved with the Inland Wetlands Management Program, primarily providing technical support and resources to the State's municipal wetlands commissions and citizens, since 1996.

Atty. Zizka stated his goal to be as freely available as possible to respond to any questions regarding all aspects of the wetlands and land use law, including any specific areas or cases. Two documents related to this evening's discussion were provided to the Commission: *Inland Wetlands and Watercourses Regulations*, which is prepared bi-annually for the CT Bar Association's Land Use Training Course, and *Basic Legal Principles and Checklist for Land Use Regulation*. The latter document, which includes a guide and basic checklist for Land Use Commissioners to utilize for any applications or proposed changes to their regulations or maps, was reviewed and discussed.

Commission's Authority & Jurisdictions – As a town, the Commission's authority derives from the State's laws; the Commission does not have any inherent authority. The Commission must ensure that they are complying with the State Statutes; not doing so may invalidate any formal actions by the court.

The State allows Commissions to develop the law within particular areas of jurisdictions. For example, the State law defines inland wetlands, watercourses, and specifies certain procedures, but does not specify the exact process by which a decision shall be made. The exact process, i.e., standards and criteria, is further defined by each municipality in its regulations. Wetland Commissions are more restricted and constrained by State law in comparison to Planning & Zoning Commissions. Each Commissioner should familiarize themselves with Connecticut's Inland Wetlands and Watercourses Act as outlined in Sections 22a-36 through 22a-45 of the Connecticut General Statutes.

Adjudication Process: Recusals and *Ex parte* – The importance of a Commissioner to recuse him/herself based on his/her position, albeit personal or financial, in relation to an application was discussed. It is critical that, though the Commissioner might feel that he/she is able to review and decide on a case objectively, that the public be assured of the same; their perception and trust in the Commissioner's objective findings is paramount. Such decisions must also be made within the Freedom of Information Act (FOIA) laws and rules against *ex parte* contacts or information received outside of the public meeting(s). All decisions made by the Commission must be based on the evidence that was submitted for the record and included in the formal decision-making process, including any documents, minutes, and transcripts and the public must be privy to the same information.

Roles of Commissioners & Designated Enforcement Agent – Individual Commission member(s) do not generally have the authority to investigate a possible violation and/or be involved in the enforcement process. Such enforcement proceedings are under the guise of the Designated Enforcement Agent. Limited authority may be provided to a

Commissioner(s) to act as the town's Designated Enforcement Agent should the municipality be lacking staffing, per their regulations, by conducting a formal vote. Should an individual Commission member proceed to investigate a matter without the authority to do so, his/her action(s) could result in a trespassing and/or fourth amendment violation. Similarly, the Designated Enforcement Agent should heed such laws and obtain the owner's permission prior to entering any given property. Significant violations may be referred to the State and/or Federal authorities.

Recusals (Commissioners Khan-Bureau, Natoli, and a member of the public) – While the Commission may recommend that a Commissioner recuse him/herself from a case, he/she is not required to do so. Should the Commission fail to reach a quorum due to a recusal, the Commission may inquire the public during the public hearing as to whether they would be opposed to the member sitting on the case. It is important to note that, an aggrieved member of the public who was not able to attend the meeting and voice their opposition, may file an appeal and the Court may require that the case return to the Commission for a new vote.

Should the complainant be a Commissioner, he/she should consider recusing themselves if the nature of the complaint has a direct impact on his/her personal interests or property regardless of whether any members of the public is present. A Commissioner should opt to recuse him/herself or, at the very least, inform the public of any potential conflict(s). The importance of the public's ability to reasonably believe that the individual(s) will be able to make an objective decision regarding the application was stressed. In an effort to ensure the public's confidence, CT DEEP's Winther stated that she has witnessed cases in which an extension is granted or the applicant would withdraw and re-submit the application to accommodate the timing requirements. She has also witnessed one case in which the Board of Selectmen was forced to appoint new Commission members.

Recusal vs. Abstention (Commissioner Messervy) – A recusal would prohibit the Commissioner from voting on the matter whereas an abstention is considered a form of vote. An abstention has the possibility of affecting the final vote.

Meeting Recordings and Transcripts (Commissioners Bradley and Natoli) – According to State Law, Planning & Zoning Commission and Zoning Board of Appeals meetings are required to either record and/or transcribe public hearings or any meeting during which a deliberation for an application is taking place. Because minutes do not always reflect the actual or entire discussions of a meeting, Atty. Zizka recommended that all public hearings and/or proceedings be recorded to ensure that there is a complete record of the process. All thoughts and concerns should be raised and entered into the record. All members of the public should be provided an adequate period of time to speak and have a reasonable opportunity to participate in the public hearing. All comments related to the

merits of an application on an agenda should be reserved for the public hearing portion of the meeting and not presented during the public comment portion of the meeting.

Ex parte (Commissioner Bradley) – The *ex parte* rule applies to cases in which the adjudication process has begun. Commissioners should not engage in any outside discussions regarding the case with either the Wetlands Officer or their fellow Commissioners. The public perception of a case being discussed prior to or during a case must be considered; it is best practices to keep all discussions on the record. CT DEEP's Winther added that, while the burden of proof falls upon the Applicant to present their case to the Commission, the burden of proof in the case of a violation falls upon the Commission and some research and discussions would be required to determine whether a violation is taking place and, if so, the extent of the violation.

Complaint Procedure (Commissioner Khan-Bureau) – A complaint form provides the public with an opportunity to submit a concern(s) to the town and should not be dictated as the only method of submitting a concern. The registration of a complaint is a First Amendment right.

Site Walks – Site walks involve both the Freedom of Information Act (FOIA) and the Fourth Amendment. Permission from the applicant(s) to enter a property for a site walk must be received. The property owner is not required to allow the Agent or Commissioner(s) to enter their property. Per a recent Supreme Court ruling, under FOIA, a quorum is not necessary for a site walk to be considered a meeting and all FOIA requirements would apply regardless of the number of Commissioners present for the site walk. As such, all site visits must be properly noticed and the public must be invited and the property must be accessible to attend the meeting. CT DEEP's Winther added that the purpose of a site walk is for orientation purposes only and not to discuss the merits of the application; any discussions should be reserved for a formal meeting. Alternative options include narrowing the area(s) of the site walk, hiring a third-party consultant to review the site, or engaging the staff to attend the site with either one designated Commissioner or each individual Commissioner on separate occasions to take any necessary notes and photographs, which can be compiled by the staff into one unified report and presented the Commission and the public. She also proposed the possibility of including a refundable complex application fee to offset the consultant's costs.

Wetlands Maps (Commissioners Bradley and Khan-Bureau) – Atty. Zizka stated that, generally, the regionally-used wetlands maps are dated, not appropriately scaled, and many were based on aerial photographs and flyovers rather than onsite reviews. As such, they are intended to be used as a guideline only and are generally not useful for determining the location of the watercourses. In addition, wetlands and watercourses change over time. He recommended partnering with the Planning and/or Zoning Commission(s) to require that applicants submit a document, signed by a certified soil

scientist, stating and/or delineating the existence or non-existence of any wetlands and/or watercourses on the property. The only manner in which the existence of wetlands on a property can be confirmed is by a field inspection. While the maps are helpful in determining the locations of the wetlands, it is only by examining the soil conditions in the area. CT DEEP's Winther agreed, adding that the map does not outline or dictate where the Commission's authority lies nor do they have any authority over the wetlands. Rather, the Commission has authority over any regulated activities that are likely to impact or affect the wetlands. Nearly all municipal regulations require applicants to submit a map delineating the wetlands/watercourses on any given property generated by a qualified professional in the field as part of the application process. In addition, sections of the Planning & Zoning Statute require applicants to submit an application with the Inland Wetlands Commission should any wetlands or watercourses exist on the property as part of the site/plan review. She confirmed that the map is for general planning purposes only and is not meant to replace onsite delineations of the property and the CT DEEP recommends that the map and the town's regulations contain a statement noting it as such. Generally, any body of water three acres or smaller, including vernal pools or intermittent watercourses, would not be noted on the map. She reiterated the importance of recognizing that it is the soil and landscape that determines whether any wetlands are located on the property rather than the map; the map is a guide and should not be relied upon for determining the actual existence of wetlands/watercourses on the property.

Funding & Resources (Commissioner Natoli) – Additional funding and resources are available to municipalities through the Conservation Districts, which are available to help towns assess sites and understand the landscape, and CTDEEP, which can assist towns in larger cases.

Drones (Commissioner Messervy) – Currently, there are no State laws regarding the use of drones to inspect or document a property. The Federal courts have offered differing opinions and caution is advised when using drones. Generally speaking, the law allows one to take unlawful photographs from a normal altitude.

Federal, State, and Planning & Zoning and Inland Wetlands Commissions jurisdictions with respect to the Eightmile River Wild & Scenic Watershed Overlay Zone

(Commissioner Natoli) – In general, Federal law is superior to State law which, in turn, is superior to the local laws. In terms of wetlands, the Army Corps of Engineers (Federal) jurisdiction is separate and defines wetlands differently from the State and reviews cases with a different set of criteria than the local government. Both the Army Corps of Engineers and the State regulations work in tandem such that approvals must be gained from both entities for a proposed activity to take place. Federal laws are not intended to replace State or local laws. Local agencies do not have their own jurisdiction and are

bound by the State's laws. The State's Inland Wetlands Regulations has designated local municipalities with the authority to manage their inland wetlands. The State will only become involved in cases involving a specific, defined wetland aspect that requires specific State authority/jurisdiction or if the State finds that the local agency is not doing its job. In terms of the Eightmile River Overlay Zone, both the Planning & Zoning and Inland Wetlands Commissions have their own, separate jurisdictions and, while their regulations might cover similar interests and the violations might violate both regulations, both agencies process their own enforcement actions with respect to the violation(s). CTDEEP's Winther agreed that the Army Corps of Engineers has a different definition of wetlands and local agencies are required to implement State law. Any proposed work to be conducted on State property, will, most likely, require the review and approval of CTDEEP. Local agencies do not implement Federal law, but may recommend that the applicant enquire with the Army Corps of Engineers. In terms of enforcement, Federal, State, and local laws are different and may result in concurrent enforcements. She cited a 2014 court case involving Frances Erica Lane Inc v. Board of Zoning Appeals of the Town of Stratford regarding inland wetland setbacks for road and driveway developments for wetlands and watercourses. Though the proposed activity(ies) might overlap under different jurisdictions, both agencies, i.e., Planning & Zoning and Inland Wetlands Commissions, regulate certain aspects of the activity. As such, each agency exercises its own authority under its regulations and is confined to the jurisdiction that is written in their respective regulations.

Municipal Online Training – CTDEEP's Winther stated that it is hoped that the training will be available within the next two weeks. Once available, the course will be posted on the CTDEEP website (portal.ct.gov/DEEP) and an e-mail blast will be sent. The course will be free and individuals will have up to 60 days to complete the course. Information regarding the course will also be available on the UConn CLEAR (Center for Land Use Education and Research) website (clear.uconn.edu). Atty. Zizka will investigate the timeframe within which new Commission Members should complete the training.

Types of Applications – The types of applications and any pertinent regulations and State or Federal laws related to such applications should be considered, e.g., Affordable Housing Appeals Act, Religious Land Use and Institutionalized Persons Act, Americans with Disabilities Act.

Authority of Duly Enforcement Agent (Commissioner Bradley) – A narrow scope of authority is provided to the Duly Enforcement Agent to issue determinations, decisions, and permits. An applicant may appeal the Agent's findings to the Commission, who has the independent power to make a decision that could oppose and override the Agent's decision. The decisions must be based upon the information that has been provided and is on the record. Additional information may be provided during the appeal process as it

would be considered a new process. CTDEEP's Winther agreed, adding that the State Statutes allow the Agency to delegate a Duly Authorized Agent to act on their behalf to issue certain permits in the Upland Review Area that would have minimal or no impact on the inland wetlands and watercourses. In addition, the Statutes also discuss the role of a Duly Authorized Agent with respect to the issuance of orders, including exemptions. Other duties that are tasked to the Duly Authorized Agent to support the Commission should be agreed upon between the Town and the agent.

Commissioner Experts (Commissioner Khan-Bureau) – Any expert members on the Commission should inform the public of their professional background should their expertise be relevant to the comments he/she is making for the record. Similarly, the staff should also reveal any relevant credentials. This can be done by simply making the individuals' resumés available to the public.

The Commissioners expressed their appreciation to Atty. Zizka and CTDEEP's Winther for attending their meeting and providing the presentation. Chairperson Bradley also reiterated their appreciation to the Eightmile River Wild & Scenic Watershed Coordinating Committee and National Park Services for making this training session possible.

Atty. Zizka encouraged the Commissioners to read and review the *Inland Wetlands and Watercourses Regulations*, which is prepared bi-annually for the CT Bar Association's Land Use Training Course, for a basic grounding on wetlands laws and procedures. He offered his availability to respond to any future questions they might have.

CTDEEP's Winther informed the Commission of recent legislative changes that affect the permitting timeframes, much of which is related to the COVID-19 pandemic.

7. Public Hearing(s) – none

8. Old Business

a. Grisafe Restoration Report

ZWEO Allen reported that Soil Scientist Richard Snarski has submitted the required annual report for the property located at 1 Fett Road. The report indicates that, while some invasive species have sprouted and been subsequently removed, the restoration plan is proceeding as expected. An updated report will be provided next year, as required.

9. Wetlands Enforcement Officer's Report

A Zoning Application was received for the property located at 10 Forsyth Road. Because the property also includes wetlands and is located along the Eightmile River Watershed, the property owner(s) have been informed that a wetlands application will be necessary.

First Selectman Ed Chmielewski has informed him that Jim Miller, Mike Smith, and Dean Wojcik are expected to be appointed to the Commission by the Board of Selectmen at their next regular meeting.

10. Correspondence

Chairperson Bradley reported that she received a phone call from Salem Land Trust President Linda Schroeder regarding maintenance needs at the Woodland Warbler Preserve, including the clearing of a culvert and placement of gravel allowing access on to the Preserve. Commissioner Natoli reported that work, including the installation of a fence, has been conducted in the wetlands at the Preserve. He felt that an as-of-right determination should be required for the activities. Commissioner Khan-Bureau concurred.

No additional information has been received regarding the Multi-Purpose Path/Harris Brook Trail bridge. The item will be included on the Commission's January agenda.

11. Plus Deltas/Announcements

Chairperson Bradley thanked Atty. Zizka and CT DEEP's Winther for attending their meeting and providing this evening's training and wished everyone a Happy Holiday season. She hopes to have their future meetings televised/recorded.

12. Adjournment

**M/S/C: Khan-Bureau/Natoli, to adjourn the meeting at 10:01 p.m. Discussion: None.
Voice vote, 5-0, all in favor.**

Respectfully Submitted by:

Agnes T. Miyuki, Recording Secretary for the Town of Salem